

In re Appln. of Gil et al.
Application No. 10/027,965

(Old) Attorney Dkt. No. M-11872US
(New) Attorney Dkt. No. 21-015 ITW 20552

PATENT

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Gil et al.

Art Unit: 3627

Application No. 10/027,965 (Conf. No. 1405)

Examiner: Steven B. McAllister

Filed: December 19, 2001

For: REPORTING IN A SUPPLY CHAIN

**TRANSMITTAL OF
APPELLANT'S REPLY BRIEF**

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Dear Sir:

In accordance with 37 CFR 41.41, Appellant hereby submits a Reply Brief, responding to new arguments presented in an Examiner's Answer, which was mailed on November 21, 2007.

An Appeal Brief in this matter was submitted previously on January 25, 2007, and was accompanied by a \$500 appeal brief filing fee. A revised Appeal Brief was submitted on September 7, 2007 along with a four-month extension of time fee of \$1590.

If any additional fee is required in connection with this communication, charge Deposit Account No. 503286 of Perry Hoffman & Associates, P.C.

Date: January 17, 2008

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APPELLANTS' REPLY BRIEF

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Alexandria, Virginia 22313-1450

Dear Sir:

In further support of the appeal from the final rejection dated June 2, 2006, Appellants now submit their Reply to the Examiner's Answer mailed on 11/21/2007. This Reply Brief incorporates by reference the Revised Appeal Brief filed on September 18, 2007 in its entirety. It addresses only the newly-raised issues found in the Examiner's "Response to Argument," and more particularly to the issues raised in "Group B" of part "(10)" of the Examiner's Answer, presented on pages 6 and 7 of that Answer.

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I. Real Party in Interest

The patent application that is the subject of this appeal is assigned to Illinois Tool Works, Inc.

II. Related Appeals and Interferences

There are no related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

The application, as filed, included 26 claims. Of these, claims 1-6, 13-17, and 23-26 have been withdrawn.

Claims 7-12 and 18-22 have been rejected. No claims have been allowed.

Applicants appeal the rejection of claims 7-12 and 18-22.

IV. Status of Amendments

No amendments have been entered subsequent to the Final Rejection mailed on June 2, 2006. Accordingly, the Claim Appendix reflects the claims as of that date.

V. Summary of the Claimed Subject Matter

The summary of claimed subject matter presented on pages 3 through 10 of the Appeal Brief filed on September 18, 2007 is hereby incorporated by reference into this Reply Brief. The summary of claim 7 begins on page 3 of that brief; the summary of claim 10 begins on page 6 of that brief; and the summary of claim 18 begins on page 8 of that brief. The Examiner, in his Answer, indicates that this summary is correct.

VI. Grounds of Rejection to be Reviewed on Appeal

Claims 7-12 and 18-22 stand rejected under 35 U.S.C. §102(b) as being anticipated by Mowery, *et al* (U.S. Patent no. 5,983,198).

Claims 10 and 11 stand rejected under 35 U.S.C. §103(a) as being obvious in view of Mowery, *et al*.

Applicants traverse these rejections.

VII. Argument

(Note on citations: The MPEP cites contained in this Reply Brief all refer to Revision 6 of the Eighth Edition. The MPEP cites contained in the Appeal Brief filed on September 18, 2007 all refer to Revision 5 of the Eighth Edition.)

This Reply Brief presents, in part A, Appellants' response to new arguments relating to claim 10 presented by the Examiner for the first time in the Examiner's Answer filed on November 21, 2007. In part B, this reply brief presents a brief discussion of the possible relevance to claim 10 of the "Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International v. Teleflex, Inc.*" which guidelines were published by the USPTO on October 10, 2007, after the Brief on Appeal was filed.

A. Response to Examiner's New Statement Relating to Claim 10

Dependent claim 10 adds to the elements of independent claim 7 one additional element: the step of "converting the real-time data into a format usable by the network system."

1. The Examiner's 35 U.S.C. §103(a) Rejection of Dependent Claim 10

The Examiner's 35 U.S.C. §103(a) rejection of dependent claim 10, which was repeated identically in both the non-final and final rejections and also in the Examiner's Answer, is based upon a single published prior art reference – the Mowrey, *et al.* patent. It is not based upon two published references, as is normally the case for '103 rejections. The rejection reads as follows:

Claim 10 is rejected ... under 35 U.S.C. 103(a) as obvious over Mowrey.

...

... Mowrey shows all elements except converting the data into data usable by the network. However, to convert data from an outside system to data usable by another system is notoriously old and well known in the art. It would have been obvious to one of ordinary skill in the art to do so in order to allow the system to successfully use the information. [Non-final Rejection dated 9/14/2005, page 4; Final Rejection dated 6/2/2006, pages 3-4; Examiner's Answer, page 5.]

Note that the true legal basis which underlies this rejection is not clearly set forth here. Careful study of this rejection reveals that it is not a simple rejection of claim 10 based upon the Mowrey, *et al.* patent as prior art; this rejection is a much more complex rejection which is based upon that patent as prior art plus the Examiner taking "Official Notice" of what he calls "old and

well known” prior art (the step of “converting the data into data usable by the network”). However, the phrase “Official Notice” or a similar phrase does not appear anywhere within this rejection. The Examiner also fails to describe this “old and well known prior art” in any way. This rejection is accordingly objectionable for two reasons: first, it does not state clearly and understandably the legal basis underlying the rejection; and secondly, it does not identify and describe part of the “prior art” underlying this rejection.

2. The New Statement in the Examiner’s Answer Relating to Claim 10

The Examiner’s Answer contains a new statement – a statement that was not part of the Examiner’s earlier non-final and final rejections. This new statement contains a description of new prior art that the Examiner wishes to add to the record on appeal at this time, and accordingly this new statement contains an entirely new grounds for the rejection of claim 10. This new statement reads as follows:

(10) Response to Argument

Group B

Applicant did not properly traverse the Examiner’s rejection of claim 10 as being notoriously old and well known in the art after the non-final action mailed on 9/14/05.

Therefore, the known facts were considered admitted prior art at the time of the final action. The Examiner still believes that converting real-time data into a format usable by a network system is considered old and well-known. For example, in a wireless communication system, the data received from external sources is converted into a common markup language for internal processing before being sent to the users. [Examiner’s Answer, pages 6-7.]

Appellants strongly object to this statement of the Examiner. In the Examiner’s Answer, the Examiner identifies for the first time (following the “for example” clause above) just what the prior art is that the Examiner is relying upon. Having finally clarified and expanded his rejection of claim 10 somewhat to make it more intelligible, the Examiner turns around and refuses to allow Applicants to respond to this expanded rejection as clarified.

3. The Examiner Is Not In Compliance With Applicable Patent Office Guidelines

The Examiner is now asserting (in the new statement set forth above) that Appellants should have recognized the true legal nature of the Examiner’s “Official Notice” rejection when it first appeared, and they should have traversed it in response to the initial non-final rejection.

The Examiner is thus complaining that Appellants' more general response to the non-final rejection, a response that focuses upon distinguishing the Mowrey, *et al.* patent from the claims, was insufficient as a matter of law to enable Appellants, in their briefs on appeal, to respond more directly to the "Official Notice" legal nature of the rejection and to the Examiner's more recent clarification and expansion of this rejection.

In proceeding in this manner, the Examiner is out of compliance with clear guidelines set forth in the MPEP explaining how "Official Notice" types of rejections are to be handled.

First, all the statements made by the Examiner in the Examiner's Answer and in the Examiner's earlier rejections of claim 10 fail to satisfy the following clear requirement that is set forth at the end of the paragraph MPEP 2144.03(B):

.... The applicant should be presented with the explicit basis on which the examiner regards the matter as subject to official notice so as to adequately traverse the rejection in the next reply after the Office action in which the common knowledge statement was made.

Secondly, the Examiner is now attempting to punish Appellants for not complying fully with the first paragraph of MPEP 2144.03(C) when the Examiner himself has not complied at all with the second paragraph of that same MPEP passage. The first paragraph of MPEP 2144.03(C) reads as follows in respect to findings of "official notice:"

To adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. See 37 CFR 1.111(b).

The Examiner wishes this Board to punish Appellants for not having complied fully with this first paragraph. But the Examiner himself has not complied at all with the immediately-following second paragraph of of MPEP 2144.03(C) which requires the examiner to perform the following task:

If applicant does not traverse the examiner's assertion of official notice ... , the examiner should *clearly indicate* in the next Office action that the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant ... failed to traverse the examiner's assertion of official notice [emphasis added]

The Examiner has completely failed to perform this task. No such clear indication can be found in the Final Rejection dated 6/2/2006 (quoted above). The wording of the Final Rejection in this respect matches that of the earlier non-final rejection, and neither rejection advised Appellants that their failure to traverse the Examiner's "assertion of official notice" is to be taken to be an admission that the Examiner's statement is to be taken as admitted prior art.

Accordingly, the Examiner is entirely out of compliance with the procedural requirements set forth in MPEP 2144.03 (B) and (C). These requirements were included for the benefit and the protection of patent applicants, to make them fully aware of the nature of "Official Notice" rejections and of the need to traverse such rejections. In this case, the failure of the Examiner even to explain that "Official Notice" was the basis of his rejection all along is particularly objectionable.

Now that the Examiner has finally confirmed, by his tardy attempt in the Examiner's Answer to block Appellants from questioning the supposed "prior art" of which the Examiner has taken "Official Notice," the Examiner cannot now object and is estopped, as a matter of fairness, from blocking applicants' in their present effort to object to the sufficiency of the Officially-Noticed facts about the prior art in Appellants' Appeal Brief and in this Reply Brief. The Examiner has yet to clearly state his grounds for rejecting claim 10 based upon "Official Notice." As things stand, this rejection should be treated as a newly-raised issue, one that Appellants have every right to respond to fully in both the Appeal brief and (as to new statements found in the Examiner's Answer) in this Reply Brief.

4. The Examiner's "Officially-Noticed" Facts Are Too Vague and Indefinite to Support The Rejection of Claim 10

Once an applicant has objected to the official notice, as the present Appellants did in their Appeal Brief, the next portion of MPEP 2144.03(C) states what the Examiner must do in response to such an objection:

... If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained. See 37 CFR 1.104(c)(2). See also *Zurko*, 258 F.3d at 1386 ... ("[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test). If the examiner is relying on

personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. See 37 CFR 1.104(d)(2).

In the Examiner's Answer, the Examiner says:

... The Examiner still believes that converting real-time data into a format usable by a network system is considered old and well known. For example, in a wireless communication system, the data received from external sources is converted into a common markup language for internal processing before being sent to the users.

This statement by the Examiner in the Examiner's Answer is completely inadequate. It is vague and indefinite and not at all in accord with the requirements of MPEP 2133.03 (B) and (C) set forth above. It raises the following questions, but does not answer them:

What type of a "wireless communication system" is the Examiner speaking of? Clearly, there are many such systems that do not reformat any data which is transmitted wirelessly from one place to another. For example, the commonly-used IEEE 802.11(g) home computer networking systems do not reformat any data that is transmitted. What are the "external sources" the Examiner refers to? Are these computers sharing an IEEE 802.11(g) network? What is a "common markup language" the Examiner refers to? Is the Examiner referring to the "HTTP" document markup language? That is a standardized Internet markup language that does not require any reformatting, since it is understood everywhere. What type of "internal processing" is the Examiner referring to? The packetizing and un-packetizing of data before and after a TCP/IP wireless transmission does not reformat the data in any way – it simply carves the data into IP packets and then reassembles the data after transmission. What type of "users" is the Examiner referring to? Computer users sharing web pages containing the "HTTP" markup language over an IEEE 802.11(g) wireless network? No reformatting of data occurs with such users in such a network.

5. In Combination with the Mowery, et al. Patent, the "Officially- Noticed" Facts Do Not Render the Present Invention Obvious

This statement in the Examiner's Answer is also inadequate to serve as an explanation of why, in the specific context of the Mowery, et al. patent's prior-art teachings, the conversion of real-time transaction data (relating to transactions between an enterprise and its partners) into a

format usable by a network system is “old and well known.” It must be remembered, as was explained more fully in the Appeal Brief (pages 18-19), that the Mowery, *et al.* patent does not disclose a supply side computer network that interchanges purchase and sale orders, inventory information, and the like among an enterprise and its trading partners and their customers all of whom most likely have entirely incompatible computer systems. Mowery discloses only a system where one supplier of oil provides only its own customers with compatible equipment for measuring how full the customer’s oil tanks are, equipment that can be networked together to report the level of oil in the tanks without the need for any format conversions being performed. In the specific context of the Mowery prior-art, it makes no sense at all to add useless real-time data format conversion hardware to equipment that clearly does not need any such format conversion.

Also, what type of format conversion hardware would be needed for use with the Mowery *et al.* tank level measuring equipment? Since only one number (representing the level of oil in a tank) is being measured, the format conversion hardware could be a simple multiplier that scaled the one number up or down by simple multiplication. Would such a multiplier work to reformat “real-time data relating to a transaction in which the partner is involved”? Clearly not. Numbers identifying quantities of goods could be simply scaled, but the accompanying identifiers of the type of goods would have to be replaced through a complex table look-up or translation scheme much more complex than what the Mowery *et al.* tank level measuring equipment would require. Accordingly, even if the Mowery, *et al.* equipment was modified to perform a format conversion, it would still be entirely unsuitable for use in implementing the present invention. Even so modified, Mowrey, *et al* would not teach the present invention.

6. *What Type of Facts may be “Officially Noticed”*

MPEP 2144.03(A) explains in its first paragraph that the type of facts an Examiner can take official notice of are facts such as “it is old to adjust intensity of a flame in accordance with the heat requirement” (*In re Ahlert*, 424 F.2d 1088, 1090, 165 USPQ 418, 420 (CCPA 1970)) or “tape recorders commonly erase tape automatically when new ‘audio information’ is recorded on a tape which already has a recording on it” (*In re Fox*, 471 F.2d 1045, 1407, 176 USPQ 340, 341 (CCPA 1973)). The first paragraph of MPEP 2144.03(A) explains that it “might not be

unreasonable” to take official notice of the fact that it is desirable to make something faster, cheaper, better, or stronger without the specific support of documentary evidence.” That same paragraph goes on to say:

... [I]t might not be unreasonable for the examiner in a first Office action to take official notice of facts by asserting that certain limitations in a dependent claim are old and well known expedients in the art without the support of documentary evidence provided the facts so noticed are of notorious character and serve only to “fill in the gaps” which might exist in the evidentiary showing made by the examiner to support a particular ground of rejection. *In re Zurko*, 258 F.3d 1379, 1385, 59 USPQ2d 1693, 1697 (Fed Cir. 2001); *In re Ahlert*, 424 F.2d 1088, 1092, 165 USPQ 418, 421 (CCPA 1970).

When such “official notice” given in a first office action is later traversed, MPEP 2144.04(D) makes it clear that the Examiner is expected to then add a prior-art reference “in the next Office action after applicant’s rebuttal.” The Examiner has not yet done this.

The Examiner says “[T]o convert data from an outside system to data usable by another system is notoriously old and well known in the art.” He also says “converting real-time data into a format usable by a network system is considered old and well known.” These two statements are insufficient as a matter of law. MPEP 2144.02(C), 3rd paragraph, says:

It is never appropriate to rely solely on “common knowledge” in the art without evidentiary support in the record, as the principal evidence upon which a rejection is based.

The following two cases are quoted with approval in MPEP 2144.02(C):

[W]e reject the notion that judicial or administrative notice may be taken of the state of the art. The facts constituting the state of the art are normally subject to the possibility of rational disagreement among reasonable men and are not amenable to the taking of such notice. (*In re Eynde*, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973).)

[T]he Board cannot simply reach conclusions based on its own understanding or experience—or on its assessment of what would be basic knowledge or common sense. Rather, the Board must point to some concrete evidence in the record in support of these findings. (*In re Zurko*, 258 F.3d 1379, 1385, 59 USPQ2d, 1693, 1697 (Fed. Cir. 2001).)

Clearly, the Examiner committed a serious, reversible error when he took Official Notice that “to convert data from an outside system to data usable by another system is notoriously old

and well known in the art” and when he later took Official Notice that “converting real-time data into a format usable by a network system is considered old and well known.”

7. Newly-Established Patent Office Policy Requires That Issues Should Not Be Postponed to RCEs

If the Board refuses to allow applicants to respond fully to the Examiner’s new position, Applicants will have to file a Request for Continued Examination (RCE) to gain a fair hearing as to claim 10. Prior to November 1, 2007, there were no limits on the filing of RCEs. But the rules of practice which went into effect on November 1, 2007 (72 FEDERAL REGISTER No. 161, 46716-46843) limit the number of RCEs that applicants may file – they penalize applicants for not raising issues at the earliest opportunity. New Rule 37 C.F.R. 1.78(d) (1) (vi), for example, requires a petition to be filed demonstrating that an “amendment, argument, or evidence sought to be entered could not have been submitted during the prosecution of an earlier-filed application.” Given the USPTO’s dramatic policy shift towards a policy of encouraging the raising of all issues at the earliest possible stage of prosecution, as expressed in these new rules, this Board should follow this same policy and support the raising and resolution of issues at the earliest possible stage of prosecution. Accordingly, this Board should accept and study those parts of Appellants’ Appeal Brief and Reply Brief which traverse the Examiner’s defective finding of facts relating to “Official Notice” of prior art not of record.

B. Discussion of KSR Guidelines

The following discussion also relates to the patentability of dependent claim 10.

The following paragraphs present a brief discussion of the possible relevance to this appeal of the “Examination Guidelines for Determining Obviousness under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International v. Teleflex, Inc.*” 72 FED. REG. No. 195, 57526-57535 (October 10, 2007) (hereinafter “KSR Guidelines”) which were published by the USPTO after the Brief on Appeal was filed.

The KSR Guidelines “do not have the force and effect of law” (page 57526), but they will be included in the next revision of the MPEP. To the extent that sections of the current MPEP are inconsistent with the KSR Guidelines, “Office personnel are to follow these guidelines.”

Appellants' Appeal Brief, on page 18, explains that the Examiner has failed to cite a second reference against dependent claim 10 in support of the 35 U.S.C. §103(a) rejection of that claim. Instead, the Examiner has expressed as "Official Notice" his belief that "to convert data from an outside system to data usable by another system is notoriously old and well known in the art." Applicants concluded from this, on the basis of MPEP 706.02(j), that the Examiner "has failed to establish a *prima facie* case of obviousness."

The following passage, taken from column 3 on page 57534 of the KSR Guidelines, appears to undermine Appellants' position:

If an applicant disagrees with any factual findings by the Office, an effective traverse of a rejection based wholly or partially on such findings must include a reasoned statement explaining why the applicant believes the Office has erred substantively as to the factual findings. A mere statement or argument that the Office has not established a *prima facie* case of obviousness or that the Office's reliance on common knowledge is unsupported by documentary evidence will not be considered substantively adequate to rebut the rejection or an effective traverse of the rejection under 37 CFR 1.111(b). ... See MPEP §706.07(a).

Appellants' position is still supportable because appellants did not simply rely upon the lack of a *prima facie* case of obviousness. Appellants have gone on, both in the Appeal Brief and in this Reply Brief, to explain just why the Examiner's '103 rejection of claim 10 is unsound. In the Appeal Brief, Appellants presented substantive reasons supporting the patentability of claim 10 beginning at the bottom of page 18 and continuing on into page 20. In this Reply Brief, Appellants have presented additional substantive reasons supporting the patentability of claim 10, and in particular Section 5 above (pages 10-11). This brief has also pointed out the inadequacy of the Examiner's one-sentence description of "Officially Noticed" prior-art which appears at the top of page 7 in the Examiner's Answer. The Office has failed to establish a *prima facie* case of obviousness and has also failed to present a convincing argument that the prior art of record anticipates claim 10.

C. Conclusion

Nothing in Mowery, *et al.* appears to disclose the transaction-oriented methods and systems of the invention as claimed for enabling an enterprise and its partners to perform

transactions. Nothing in Mowery, *et al.* appears to disclose integrating a partner coordinator component into existing proprietary partner computer systems to couple them into an enterprise supply chain network having other partners. And (with respect to dependent claim 10), nothing in Mowery, *et al.* appears to disclose including in such a partner coordinator an adaptation component that can reformat proprietary customer data to make the data understandable to other components of such a supply chain.

Applicants respectfully submit that the pending claims are patentable over the reference relied upon by the Examiner. For the reasons given above, the present invention is considered to be in proper condition for allowance and action to that end is respectfully requested.

Respectfully submitted,

Date: January 17, 2008

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VIII. CLAIMS APPENDIX

1-6. (Withdrawn)

7. (Original) An automated method for reporting in a supply chain involving an enterprise and at least one partner, the method comprising:

 sending a request for real-time data from a network system to a partner coordinator component integrated with an existing partner system, the real-time data relating to a transaction in which the partner is involved, the network system maintaining a context for the transaction;

 receiving at the network system real-time data from the existing partner system in response to the request; and

 generating a real-time report using the real-time data for updating the enterprise on the transaction in which the partner is involved, thereby providing real-time visibility into a status of the partner with respect to the transaction.

8. (Original) The method of claim 7, wherein the real-time data comprises transaction data involving a status of the transaction.

9. (Original) The method of claim 7, wherein the real-time data comprises reference data related to the partner.

10. (Original) The method of claim 7, further comprising converting the real-time data into a format usable by the network system.

11. (Original) The method of claim 10, wherein converting comprises formatting the real-time data into extensible markup language (XML) format.

12. (Original) The method of claim 7, further comprising validating the real-time data against the context maintained for the transaction.

13-17. (Withdrawn)

18. (Original) A system for reporting in a supply chain involving an enterprise and at least one partner, the system comprising:

a database operable to maintain a context for a transaction in which the partner is involved; and

a processor coupled to the database, the processor operable to:

send a request to a partner coordinator component integrated with an existing partner system for access to real-time data relating to a transaction in which the partner is involved;

receive the real-time data from the existing partner system in response to the request; and

generate a real-time report using the real-time data for updating the enterprise on the transaction in which the partner is involved, thereby providing real-time visibility into a status of the partner with respect to the transaction.

19. (Original) The system of claim 18, wherein the processor is operable to generate a graphical user interface for presenting the report.

20. (Original) The system of claim 19, wherein the report comprises an alert report to notify the partner of the status of the transaction.

21. (Original) The system of claim 19, wherein the report comprises a task report to notify the partner of a task relating to the transaction to be performed.

22. (Original) The system of claim 19, wherein the report comprises an inventory report to update the enterprise or the partner of an inventory level relating to the transaction.

23-26. (Withdrawn)

IX. EVIDENCE APPENDIX

The Examiner basis his rejection upon the following prior-art patent:
U.S. Patent No. 5,983,198 which issued to Mowery et al. on November 9, 1999.

X. RELATED PROCEEDINGS APPENDIX

None.